

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION

Curves International, Inc.,

Plaintiff,

vs.

Linda S. Mosbarger,

Defendant

Case Action No. 2007-CV-807-MHT

**AFFIDAVIT OF MICHAEL R. GRAY**

STATE OF MINNESOTA    )  
  ) ss.  
COUNTY OF HENNEPIN    )

Michael R. Gray, after first being duly sworn upon oath, states and alleges as follows:

1. I am a Principal in the law firm of Gray, Plant, Mooty, Mooty, and Bennett, P.A., which law firm has been retained to represent the Plaintiff in this action. I make this Affidavit based on my first-hand knowledge of the facts set forth herein.

2. I first received a copy of the Amended Answer-Counterclaim submitted by Defendant on November 26, 2007.

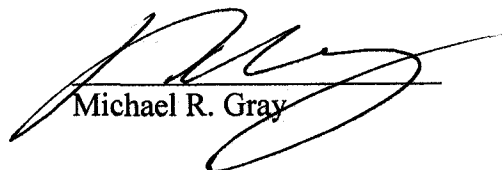
3. On December 11, 2007, I wrote to Defendant's counsel to advise her of the procedural and substantive deficiencies apparent in the Amended Answer-Counterclaim. Attached as Exhibit A is a true and correct copy of my December 11 letter.

4. On December 21, 2007, I again wrote to Defendant's counsel to advise her that a motion for sanctions would be filed unless she withdrew the Amended Answer-Counterclaim with respect to myself, Kevin Ayers, and Julie Ferrell within twenty-one days, as provided by Rule 11 of the Federal Rules of Civil Procedure. I enclosed with that letter a copy of the Motion


for Sanctions to be filed. True and correct copies of my December 21 letter, along with a copy of the Motion for Sanctions enclosed with that letter, are attached as Exhibit B.

FURTHER YOUR AFFIANT SAITH NOT.

Dated: January 25, 2008

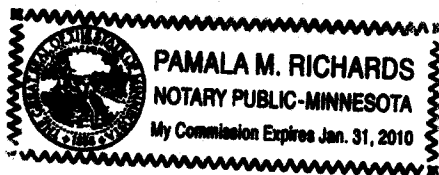
  
Michael R. Gray

Subscribed to and sworn before  
me this 25 day of January, 2008

  
Notary Public

My Commission Expires January 31, 2010

GP:2320703 v1



# **Exhibit A**



500 IDS CENTER  
80 SOUTH EIGHTH STREET  
MINNEAPOLIS, MN 55402-3796  
MAIN: 612.632.3000  
FAX: 612.632.4444

MICHAEL R. GRAY  
ATTORNEY  
DIRECT DIAL: 612.632.3078  
DIRECT FAX: 612.632.4078  
MIKE.GRAY@GPMPLAW.COM

December 21, 2007

Connie J. Morrow, Esq.  
Grainger Legal Services, LLC  
4220 Carmichael Ct., N.  
Montgomery, AL 36106

**VIA FACSIMILE & U.S. MAIL**

Re: Curves International, Inc. v. Linda S. Mosbarger (Lewis)  
Court File NO. 2007-CV-807  
Our File No. 115750

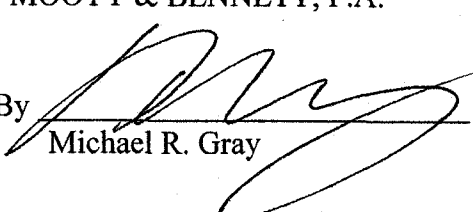
Dear Ms. Morrow:

Enclosed and served upon you by facsimile and U.S. mail, please find Michael Gray, Kevin Ayers, and Julie Ferrell's Motion for Sanctions Under Rule 11 and the Certificate of Service in the above-referenced matter. This is being served upon you in accordance with Rule 11(c)(1)(A). You have 21 days from today to withdraw or dismiss the counterclaims against the individuals or we will file this with the Court.

Very truly yours,

GRAY, PLANT, MOOTY,  
MOOTY & BENNETT, P.A.

By

  
Michael R. Gray

Enclosures

cc: Roger Schmidt, Senior Vice President & Chief General Counsel (w/encls.)  
Kevin Ayers, General Counsel (w/encls.)  
Jeff Burchfield, Esq. (w/encls.)  
Joe Carlisle, Esq. (w/encls.)  
Jason Stover, Esq. (w/o encls.)  
Julie Ferrell (w/encls.)  
Chuck Grainger, Esq. (w/encls.)

GP:2304982 v1

# **Exhibit B**



500 CENTER  
80 SOUTH EIGHTH STREET  
MINNEAPOLIS, MN 55402-3796  
MAIN: 612.632.3000  
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MICHAEL GRAY  
ATTORNEY  
DIRECT DIAL: 612.632.3078  
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MIKE.GRAY@GPMPLAW.COM

December 11, 2007

Connie J. Morrow, Esq.  
Grainger Legal Services, LLC  
4220 Carmichael Ct., N.  
Montgomery, AL 36106

**VIA FACSIMILE & U.S. MAIL**

Re: Curves International, Inc. v. Linda S. Mosbarger (Lewis)  
Our File No. 115750

Dear Ms. Morrow:

Now that the Court has determined that your client is "an owner and operator of Jordon's Gym" and that "Curves International is likely to succeed on it's breach of contract claim," it is clear that this litigation was not the result of some mistake or misunderstanding, but the deceptive and wrongful actions of your client. As such, your tactic of making unfounded and unprofessional claims against myself, Kevin Ayers and Julie Ferrell has put you at substantial risk with Judge Thompson, who confirmed that the testimony you elicited from your client was "willfully misleading." Prior to filing a motion to dismiss and for violation of Rule 11, I am requesting that you immediately dismiss the "Counterclaims" against all individuals. Consider this your notice and opportunity to respond under Rule 11 (c).

In addition to the lack of factual or legal support for the Counterclaims against the individuals, it appears that you believe you can add individual "adverse parties" under the auspices of a "Counterclaim". None of the individuals are named plaintiffs or have asserted claims against your client. In addition, it appears that you believe you can serve individual "adverse parties" via Certified Mail through me. Kevin Ayers and Julie Ferrell are Texas and Alabama residents, respectively. I have not appeared on their behalf in this action and I do not represent them individually. As such, I would appreciate it if you would provide with the legal authority for your apparent belief that you have properly initiated any legal proceedings against myself, Kevin Ayers or Julie Ferrell, or properly served any such claims.

Connie J. Morrow, Esq.

December 11, 2007

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If you fail to dismiss the individual "adverse parties" immediately and hereafter take any adverse actions against myself, Kevin Ayers or Julie Ferrell under the current procedural posture, you do so at your own peril.

Very truly yours,

GRAY, PLANT, MOOTY,  
MOOTY & BENNETT, P.A.

By 

Michael R. Gray

cc: Roger Schmidt, Senior Vice President & Chief General Counsel  
Kevin Ayers, General Counsel  
Jeff Burchfield, Esq.  
Joe Carlisle, Esq.  
Jason Stover, Esq.  
Julie Ferrell  
Chuck Grainger, Esq.

GP:2297021 v1

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION

Curves International, Inc.,

Plaintiff,

vs.

Linda S. Mosbarger,

Defendant

Case Action No. 2007-CV-807-MHT

**MICHAEL GRAY, KEVIN AYERS,  
AND JULIE FERRELL'S MOTION  
FOR SANCTIONS UNDER RULE 11**

Michael Gray, Kevin Ayers, and Julie Ferrell move this Court for an Order pursuant to Rule 11 of the Federal Rules of Civil Procedure imposing sanctions on Linda Mosbarger and her counsel for bringing Mosbarger's Amended Answer-Counterclaim against them. Mosbarger has attempted to bring a "counterclaim" against three individuals who are not parties to this action. Mosbarger has not sought leave of court to add additional parties to this case, but has instead merely attempted to unilaterally add those parties by including them as part of an improperly designated "counterclaim." Mosbarger then attempted to serve that pleading by sending copies of it via certified mail to Michael Gray. Service of an initial pleading via certified mail is not proper under the Federal Rules of Civil Procedure. Nor was service proper upon Michael Gray, who was not authorized to accept service on behalf of Kevin Ayers or Julie Ferrell.

Even had Mosbarger properly added Gray, Ferrell, and Ayers as parties to this action, the claim she asserts against them is not warranted by existing law or by a nonfrivolous argument for the extension of existing law. To the contrary, Mosbarger presented her claim for an improper purpose, namely to harass the named individuals and increase the cost of this litigation. As such Mosbarger and her counsel have violated Rule 11(b) and are subject to sanctions.

Mosbarger's Amended Answer-Counterclaim brings a single claim for criminal trespass against those individuals. Mosbarger lacks standing to bring a claim based on the violation of a criminal statute. Moreover, the conduct upon which Mosbarger relies in her Amended Answer-Counterclaim to establish a criminal trespass does not even arguably constitute a violation of law. Mosbarger does not even allege that Kevin Ayers ever visited the property at which she alleges a criminal trespass occurred, a necessary element of that offense. Moreover, Mosbarger's Amended Answer-Counterclaim denies that Mosbarger has the right of possession of the property or is otherwise authorized to order any person to leave it. Without an allegation that Gray, Ferrell, or Ayers remained on the premises at issue after receiving a lawful order to leave, Mosbarger's Amended Answer-Counterclaim cannot possibly state a viable claim for criminal trespass. Most significantly, the conduct that Mosbarger describes represents no more than a factual investigation performed by Julie Ferrell and Michael Gray during normal business hours, when the facility was open to the public. Mosbarger does not allege that the facility was closed to the public, that she had authority to demand that Ferrell or Gray leave that facility, or that Ferrell or Gray disobeyed such a demand.

Michael Gray advised Mosbarger's counsel of the significant shortcomings in the Amended Answer-Counterclaim by letter dated December 11, 2007. That letter informed Mosbarger's counsel that the Amended Answer-Counterclaim was procedurally deficient, was served improperly, and failed to state a cognizable claim for relief against the named individuals. The December 11 letter then advised Mosbarger's counsel that Gray, Ferrell, and Ayers would bring a motion for sanctions pursuant to Rule 11 unless Mosbarger's counsel dismissed the Counterclaim against the individuals. Mosbarger and her counsel have refused to do so.

Mosbarger's refusal to voluntarily withdraw this baseless pleading entitles Gray, Ferrell, and Ayers to an award of sanctions against Mosbarger and her counsel, as set forth in Rule 11.

This Motion is based on the accompanying Memorandum of Law, the affidavit of Michael Gray, the Memorandum of Law in Support of Gray, Ferrell, and Ayers' Motion to Dismiss, and all the files and proceedings herein.

Dated: December 21, 2007

**GRAY, PLANT, MOOTY,  
MOOTY & BENNETT, P.A.**

By 

Michael R. Gray (MN 175602)  
Jason J. Stover (MN 30573X)  
500 IDS Center  
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and

**JOHNSTON, BARTON, PROCTOR &  
ROSE**

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**ATTORNEYS FOR PLAINTIFF**

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION

Curves International, Inc.,

Plaintiff,

vs.

Linda S. Mosbarger,

Defendant.

Case Action No. 2007-CV-807-MHT

**CERTIFICATE OF SERVICE**

I hereby certify that I have filed a copy of the following:

- Michael Gray, Kevin Ayers and Julie Ferrell's Motion for Sanctions Under Rule 11;
- Michael Gray, Kevin Ayers and Julie Ferrell's Memorandum of Law in Support of Motion for Rule 11 Sanctions;
- Affidavit of Michael R. Gray; and
- Certificate of Service

with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Connie Morrow  
Charles E. Grainger, Jr.  
Grainger Legal Services, Inc.  
4220 Carmichael Ct. N.  
Montgomery, Alabama 36106  
[cmorrow@graingerlegal.com](mailto:cmorrow@graingerlegal.com)  
[cgrainger@mindspring.com](mailto:cgrainger@mindspring.com)

Dated: January 25, 2008

**GRAY, PLANT, MOOTY,  
MOOTY & BENNETT, P.A.**

By s/Michael R. Gray

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**ATTORNEYS FOR PLAINTIFF**